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No. ——

IN THE
Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Cross-Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Cross-Respondent

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when the EPA Administrator makes risk management decisions under § 109 of the Clean Air Act, 42 U.S.C. § 7409, she must ignore the broad economic, environmental, and indirect public health consequences of her decision to select a new NAAQS from a range of standards that reflect uncertain and indistinguishable health risks.

PARTIES TO THE PROCEEDINGS

1. CAA Industry Cross-Petitioners are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari: *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases), and *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1441 (and consolidated cases).

    American Forest & Paper Association
    American Iron & Steel Institute
    American Petroleum Institute
    American Public Power Association
    Appalachian Power Co., *et al.* is comprised of the following:
        Baltimore Gas and Electric Company
        Carolina Power & Light Company
        Central and South West Services, Inc.
            Central Power and Light Company
            Public Service Company of Oklahoma
            Southwestern Electric Power Company
            West Texas Utilities Company
        Central Illinois Public Service Company
        CINergy Corp.
        Columbus Southern Power Company
        Conectiv (petitioned as Delmarva Power & Light Co. and intervened as Atlantic City Electric Co. in the cases below)
        Consumers Energy Company
        Dayton Power and Light Company, The
        Detroit Edison Company, The

Duke Energy Co.
FirstEnergy (petitioned as Ohio Edison Co. and Centerior Energy Co., (with Centerior Energy Co. subsidiaries Cleveland Electric Illuminating Co. & Toledo Edison Co.) in the cases below)
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
LGE Energy Corp. (petitioned as Kentucky Utilities Company and Louisville Gas & Electric Co. in the cases below)
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company, dba Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
PacifiCorp
PPL Electric Utilities Corporation dba PPL Utilities (petitioned as Pennsylvania Power & Light Corp.)
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Edison Company, The

dba Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Tampa Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
dba Allegheny Power System, Inc.
Wisconsin Electric Power Company
and
Edison Electric Institute
National Rural Electric Cooperative Association
Chemical Manufacturers Association
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
Meridian Gold Company
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
(petitioned as National Petroleum Refiners Association in the case below)

National Stone Association
Nevada Mining Association
Newmont Gold Co.
Phoenix Cement Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

2. The following parties are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari, but have not joined CAA Industry cross-petitioners in filing this conditional cross-petition.

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Farm Bureau Federation
American Portland Cement Alliance
American Trucking Associations, Inc.
James Bassage
Burns Motor Freight, Inc.
Central Illinois Light Co.
Chamber of Commerce of the United States of America
Citizens for Balanced Transportation
Commonwealth Edison
Duquesne Light Co.
Equipment Manufacturers Institute
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory

Idaho Mining Association
Judy's Bakery, Inc.
David Matusow
Brian McCarthy
National Association of Manufacturers
National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Small Business United
Non-Ferrous Founders' Society
Oklahoma Gas & Electric
Richard Romero
Small Business Survival Association
State of Michigan
State of Ohio
State of West Virginia

3. Cross-Respondent United States Environmental Protection Agency was the respondent in all of the proceedings below.

4. The following parties were intervenors in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari.

American Lung Association
American Road and Transportation Builders Association
Atlantic City Electric Company
Commonwealth of Massachusetts
State of New Jersey

5. The following parties appeared as *amici curiae* in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari.

Representative Tom Bliley
Senator Orrin G. Hatch
State of Connecticut
State of New Hampshire
State of New York
State of Vermont

RULE 29.6 DISCLOSURE STATEMENT

1. The following list of CAA Industry Cross-Petitioners hereby discloses the parent companies of cross-petitioners and any publicly held companies that own 10% or more of Cross-Petitioners' stock.

Alabama Power Company
(a subsidiary of Southern Company)
Appalachian Power Company
(a subsidiary of American Electric Power Company, Inc.)
Baltimore Gas and Electric Company
(a subsidiary of Constellation Energy Group, Inc.)
Central and South West Services, Inc.
(a subsidiary of Central and South West Corporation)
Central Illinois Public Service Company
(a subsidiary of Ameren Corporation)
Central Power and Light Company
(a subsidiary of Central and Southwest Corporation)
Columbus Southern Power Company
(a subsidiary of American Electric Power Company, Inc.)
Consumers Energy
(a subsidiary of CMS Energy Corporation)
Dayton Power & Light Company, The
(a subsidiary of DPL Inc.)
Florida Power Corporation
(a subsidiary of Florida Progress Corporation)

Georgia Power Company
(a subsidiary of Southern Company)
Gulf Power Company
(a subsidiary of Southern Company)
Illinois Power
(a subsidiary of Illinova Inc.)
Indiana Michigan Power Company
(a subsidiary of American Electric Power Company, Inc.)
Indianapolis Power & Light Company
(a subsidiary of IPALCO Enterprises, Inc.)
Kentucky Power Company
(a subsidiary of American Electric Power Company, Inc.)
Mississippi Power Company
(a subsidiary of Southern Company)
Monongahela Power Company
(a subsidiary of Allegheny Energy, Inc.)
Northern Indiana Public Service Company
(a subsidiary of NiSource Inc.)
Ohio Power Company
(a subsidiary of American Electric Power Company, Inc.)
Potomac Edison Company, The
(a subsidiary of Allegheny Energy, Inc.)
Public Service Company of Oklahoma
(a subsidiary of Central and Southwest Corporation)
Savannah Electric & Power Company
(a subsidiary of Southern Company)

South Carolina Electric & Gas Company
(a subsidiary of SCANA Corporation)
Southwestern Electric Power Company
(a subsidiary of Central and Southwest Corporation)
Tampa Electric Company
(a subsidiary of TECO Energy, Inc.)
Union Electric Co.
(a subsidiary of Ameren Corp.)
Virginia Power
(a subsidiary of Dominion Resources, Inc.)
West Penn Power Company
(a subsidiary of Allegheny Energy, Inc.)
West Texas Utilities Company
(a subsidiary of Central and South West Corporation)
Wisconsin Electric Power Company
(a subsidiary of Wisconsin Energy Corporation)

2. The following CAA Industry Cross-Petitioners have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these Cross-Petitioners.

American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Carolina Power & Light Co.
CINergy Corp.
Chemical Manufacturers Association
Conectiv

Detroit Edison Co., The
Duke Energy Corp.
Edison Electric Institute
FirstEnergy Corp.
Jacksonville Electric Authority
Kansas City Power & Light Co.
Kennecott Energy and Coal Co.
Kennecott Holdings Corporation
Kennecott Services Company
LGE Energy Corp.
Madison Gas and Electric Co.
Meridian Gold Co.
Midwest Ozone Group
Minnesota Power
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (formerly National Petroleum Refiners Association)
National Rural Electric Cooperative Association
National Stone Association
Nevada Mining Association
Newmont Gold Co.
Oglethorpe Power Corp.
Ohio Valley Electric Corp.
Otter Tail Power Co.
PacifiCorp
PP&L Electric Utilities Corporation
dba PPL Utilities
Phoenix Cement Company

Plains Electric Generation & Transmission
Cooperative, Inc.
Potomac Electric Power Co.
Public Service Company of New Mexico
Salt River Project
Southern Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

CAA Industry Cross-Petitioners[1] conditionally cross-petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, No. 97-1440 (and consolidated cases), and *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, No. 97-1441 (and consolidated cases) (hereinafter "*American Trucking*"). CAA Industry Cross-Petitioners include trade associations representing most of the basic industries in this country, including the utility industry, coal industry, mining industry, oil industry, iron and steel industry, chemical industry, paper industry, paint and coating industry and home building industry; over 50 individual companies; and other organizations identified on the cover of this petition.

OPINIONS BELOW

The opinion of the court of appeals (EPA App. 1a-69a) is reported at 175 F.3d 1027. The opinions on the petitions for panel rehearing and suggestions for *en banc* rehearing (EPA App. 70a-101a) are reported at 195 F.3d 4.

JURISDICTION

The court of appeals entered its judgment on May 14, 1999. Petitions for panel rehearing were granted in part and denied in part, and suggestions for *en banc* rehearing were denied on October 29, 1999. The petitions for certiorari were docketed

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[1] Petitioners jointly filing this conditional cross-petition for a writ of certiorari are listed on the cover.

on January 27 and 28, 2000.[2] 28 U.S.C. § 1254(1) and Supreme Court Rule 12.5 provide the basis for jurisdiction for this conditional cross-petition, which is timely filed under Supreme Court Rule 12.5.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

In addition to the constitutional, statutory and regulatory provisions already set forth in the initial petitions for certiorari and accompanying appendices, additional provisions addressed in this Conditional Cross-Petition are listed below and either set forth below or in the Appendix.

1. Article I, Section 1 of the United States Constitution provides in pertinent part that "All legislative Powers herein granted shall be vested in a Congress of the United States...."

2. The Clean Air Act §§ 101(b), 108(b), 181-185B, and 307(b), 42 U.S.C. §§ 7401(b), 7408(b), 7511-7511f, and 7607(b) (App. 1a-64a); and the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 463, §§ 6101, 6102 (App. 65a-68a).

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[2] The original petitions for a writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit for these cases are Nos. 99-1257, 99-1263 and 99-1265.

STATEMENT OF THE CASE

Under our system of government, executive branch agencies may exercise only what power Congress has delegated to them. U.S. Const., art. I, § 1. In areas that are technically and scientifically complex, Congress often delegates authority in broad terms. In such cases, this Court has made clear that the *agency* must exercise its discretion to fill out the terms of the delegation, consistent with Congress' intent.

This petition seeks Supreme Court review of *judicially* imposed restrictions on the range of factors that the Environmental Protection Agency ("EPA") may legally consider in filling out the terms of a broad delegation of authority under the Clean Air Act ("CAA") to make risk management decisions in establishing or revising National Ambient Air Quality Standards ("NAAQS").

In § 109(b) of the CAA, EPA App. 111a, Congress directed EPA to set NAAQS at levels that are "requisite to protect" the "public health," allowing an "adequate margin of safety." Once NAAQS are set, EPA must review them periodically and revise them as "may be appropriate" in accordance with §§ 108 and 109(b). EPA App. 112a.

In recent rulemakings to revise the ozone and particulate matter ("PM") NAAQS, EPA refused to identify in the CAA any criterion for selecting among alternative pollutant levels that present uncertain and overlapping risks of adverse health effects.[3] For this reason the lower court remanded the revised

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[3] The background for EPA's decision is discussed at greater length in the CAA Industry Respondents' Brief in Response to the Petitions for Certiorari.

NAAQS to EPA, EPA App. 8a-11a, 18a, explaining that by failing to state a principle for defining how much risk is "too much" (i.e., how much is an "unacceptable" "public health" risk), the Agency had "construed §§ 108 and 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power." EPA App. 5a.

At the same time, the court below prohibited EPA on remand from considering the broad economic, environmental, and indirect public health consequences of its action, when it develops an "intelligible principle" to govern the exercise of its risk management judgment under § 109. According to the court, this prohibition flows from the plain language of the statute. EPA App. 19a.

CAA Industry Cross-Petitioners agree with the lower court that EPA interpreted § 109 in a way that raises nondelegation concerns, and they agree also that the Agency must articulate an "intelligible principle" to guide its exercise of discretion. Cross-Petitioners disagree, however, with the lower court's holding restricting the factors that EPA may consider in developing that intelligible principle. While we believe that the scope of EPA's authority to develop an intelligible principle is an issue fairly within the scope of the initial petitions for certiorari filed here, we request that if the Court grants any of the initial petitions, it also grant this Conditional Cross-Petition in order to focus its review specifically on this fundamental issue of national importance.

1. The NAAQS Program -- Congress provided in §§ 108 and 109 of the Clean Air Act for regulation of air pollution that "endangers" public health. Under § 109, EPA App. 111a, NAAQS are to be based on a "criteria document" that "accurately reflects the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on

public health or welfare expected from the presence of such pollutant in the ambient air in varying quantities." CAA § 108(a)(2), EPA App. 110a. "Simultaneously with the issuance of [the] criteria" document, EPA must also issue information on the "cost . . . and operation, energy requirements, emission reduction benefits, and environmental impact" of alternative methods for pollution control or prevention. CAA § 108(b), App. 1a-2a.

Under § 109, primary NAAQS must be set based on the criteria document, at a level that is "requisite to protect public health," and that allows an "adequate margin of safety." Once NAAQS are set, the Administrator must review them and the underlying criteria document every five years and revise them "as may be appropriate" in accordance with §§ 108 and 109(b). EPA App. 111a-112a. To help with this "appropriateness" determination, the Administrator must obtain the advice of her independent science advisers (the Clean Air Science Advisory Committee, or "CASAC") on additional knowledge required to determine the "adequacy" of existing standards and the "basis" for any revisions to them, and on "*any* adverse health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of revised NAAQS. CAA § 109(d)(2), EPA App. 112a, (emphasis added).

In enacting these provisions, Congress emphasized the importance of protecting "public health."[4] But it also made

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[4] *See Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1149 (D.C. Cir. 1980); *see also* S. Rep. No. 91-1196, at 10 (1970), *reprinted in* 1 Sen. Comm. on Env. and Pub. Works, *A Legislative History of The Clean Air Amendments of 1970* at 410 (Comm. Print, 1974) (hereafter referred to as "1970 Legis. Hist."); H.R. Rep. No. 95-294, at 49, (1977), *reprinted in* 4 Sen. Comm. on Env't and Pub. Works, *A Legislative History of the Clean*

clear that "public health" protection does not embrace a "no-risk philosophy" because that "ignores all social and economic consequences and is impractical."[5] Congress therefore intended the "margin of safety" standard of § 109 to reflect a "reasonable degree of protection" – not absolute protection – in the face of uncertain science.[6] As Senator Muskie, one of the architects of the Clean Air Act, explained during hearings on the 1977 amendments, Congress intended to set national standards only at levels necessary to protect against "unacceptable risks" and "to insure that public policy is wise policy, that we are protecting health and not overprotecting it, to the degree of inhibiting economic growth and the opportunities people need in order to enhance their lives."[7]

In short, §§ 108 and 109 were intended to advance, not to detract from, the congressional goal of achieving a balance that would "promote [both] the public health and welfare *and* the productive capacity of . . . [the Nation's] population." CAA § 101(b), App. 1a (emphasis added). The court of

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Air Act Amendments of 1977, at 2516 (Comm. Print, 1978) (hereafter referred to as "1977 Legis. Hist.") (stating that one of the purposes of the Act is "to emphasize the predominant value of protection to public health").

[5] H.R. Rep. No. 95-294, at 127 (1977), *reprinted in* 4 1977 Legis. Hist., at 2594; *cf.* 3 1977 Legis. Hist. at 1038 (statement of Sen. Muskie) (When there is "no threshold on health effects . . . it [is] very difficult then to apply absolute health protection.").

[6] S. Rep. No. 91-1196, at 10, *reprinted in* 1 1970 Legis. Hist., at 410.

[7] *Hearings on S. 251, S. 252 and S. 253 Before Subcomm. on Environmental Pollution of Senate Comm. on Environment and Public Works*, 95th Cong., 1st Sess., Part 3, at 6-7 (1977).

appeals' decision destroys that balance by forbidding consideration of the overall impacts on society of EPA's NAAQS decisions.

2. EPA's Rulemaking And The D.C. Circuit's Decision -- As NAAQS are revised to ever more stringent levels, the incremental health benefits of a revised standard become less certain, and harder to ascertain. At the same time, attaining more stringent standards becomes more difficult and expensive. The burdens on society that result from implementation of revised NAAQS therefore increase. Those burdens can include, for example, negative health effects caused by implementation of the NAAQS itself.

As standard-setting becomes more difficult, therefore, the costs to the public of mistakes -- including indirect public health effects and economic costs --become heavier. The only way to establish wise social policy in this situation is to consider all of the impacts of that decision on society.[8] These include not just the possible direct health benefits of a revised standard, but also other types of "risks" that might be increased or reduced as a result of standard revision. Only by considering all of the burdens and benefits to society of a decision to revise a NAAQS can the Agency conclude that the "public health" will be advanced by a change in the regulatory status quo.

The D.C. Circuit initially addressed the scope of EPA's authority to establish NAAQS under CAA §§ 108 and 109 in 1980, in *Lead Industries Ass'n, Inc. v. EPA ("Lead*

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[8] *See generally* Stephen Breyer, *Breaking the Vicious Circle* (1993); David Schoenbrod, "Remarks to the Board of Trustees of the Natural Resources Defense Council," 20 *Cardozo L. Rev.* 767 (1999).

Industries").[9] In this challenge to the original lead NAAQS, petitioners argued that EPA had improperly "refus[ed] to consider ... economic and technological feasibility" of pollution controls in establishing ambient standards for lead, a "threshold" pollutant.[10] EPA responded that it was not *required* to consider these factors, and Judge Wright agreed, explaining that Congress intended "to subordinate" economics and technical feasibility to the public health goals of § 109. *Id.* at 1149.

All the court was asked to decide in *Lead Industries* was whether EPA was *required* to consider cost and feasibility, and to the extent that the court's decision is limited to that holding it was not unreasonable: a *requirement* to consider costs could allow costs to override public health. Judge Wright went further, however, and observed broadly that "the statute and legislative history make clear that economic considerations *play no part* in the promulgation of air quality standards under section 109." *Id.* at 1148 (emphasis added). In subsequent years, the D.C. Circuit applied this broad *dictum* to bar consideration in setting NAAQS of the attainability of a revised NAAQS[11], and the indirect public health consequences of a NAAQS decision.[12]

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[9] 647 F.2d 1130, 1148 (D.C. Cir. 1980).

[10] *Id.* at 1148; *see id.* at 1138-41 (describing "threshold level[s]" for various effects). *Lead Industries* therefore did not present the more difficult risk management judgments called for by regulation of "nonthreshold" pollutants, for which EPA assumes some level of risk all the way to "zero" exposure; *see also infra* note 16.

[11] *American Petroleum Inst. v. EPA*, 665 F.2d 1176, 1185 (D.C. Cir. 1981).

[12] *NRDC v. EPA ("PM_{10}")*, 902 F.2d 962, 972-73 (D.C. Cir. 1990).

By contrast, the D.C. Circuit later took a very different approach to a parallel statutory provision commanding an even more precautionary approach to public health protection. In *NRDC v. EPA* (*"Vinyl Chloride"*), 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*), the court addressed language in § 112 of the Act requiring reduction in emissions of hazardous air pollutants to a level that protects public health with an "ample margin of safety" – a term that would appear to call for more restrictive public health policy judgment than the § 109 term "*adequate* margin of safety" (emphasis added).

Judge Bork, writing for the court, applied the approach specified in *Chevron U.S.A., Inc. v. NRDC*[13] (a case decided four years after *Lead Industries*), and found that the "margin of safety" language does not provide determinate criteria for standard setting. Rather, "the word 'safety' . . . is significant evidence that [Congress] did *not* intend to require the Administrator to prohibit all emissions of a non-threshold pollutant," because the term "'safe' does not mean 'risk-free.'" 824 F.2d at 1153 (emphasis added).

Furthermore, the court in *Vinyl Chloride* observed that while the requirement to provide an ample margin of safety to protect public health "evinces an intent to make health the primary consideration," it does "*not* . . . preclude

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[13] In 1984, in *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), the Court observed that review of an agency's interpretation of its enabling statute begins with evaluation of whether "Congress has directly spoken to the precise question at issue," and has expressed a clear intention as to its resolution. *Id.* at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue," the *agency* (not the reviewing court) must exercise its discretion to interpret the statute in light of the language, legislative history *and underlying policies of the statute*. *Id.* at 843.

consideration of any factor." *Id.* at 1155 (emphasis added). The court distinguished *Lead Industries* because that case had rejected only an argument that EPA "must" consider cost and technological feasibility. *Id.* at 1157-58. In *Vinyl Chloride*, on the other hand, the question was whether the Administrator *may* consider these factors. *Id.* (emphasis added). Thus, *Lead Industries* and earlier cases do *not* stand for the proposition that "cost and technological feasibility may *never* be considered under the Clean Air Act unless Congress expressly so provides." *Id.* at 1157 (emphasis added).

Nevertheless, the *Vinyl Chloride* court observed that the "*Lead Industries* court did note that the statute [i.e., § 109] on its face does not allow consideration of technological or economic feasibility." *Id.* at 1158-59. The court distinguished Judge Wright's broad conclusion regarding CAA § 109 from its analysis of the parallel language of CAA § 112 based on differences in the structural aspects of the ambient standards program (e.g., the role of States in determining specific implementation measures for ambient standards) and of the legislative history of § 109 (which *Lead Industries* suggested established a clear intent to preclude consideration of costs). *Id.* at 1159. The D.C. Circuit subsequently relied on the distinctions drawn by *Vinyl Chloride* in declining to apply the reasoning of this case when reviewing ambient standards.[14]

By 1990, therefore, the jurisprudence of the D.C. Circuit taught that, under the "adequate margin" language of § 109, cost and technological feasibility *need not* be considered and (according to the line of cases originating with the broad

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[14] *See NRDC v. EPA, ("PM10")*, 902 F.2d at 973.

dictum in *Lead Industries*) *could not* be considered. By contrast, cost and technological feasibility *could* be considered under the "ample margin" language in § 112(d)(4), according to the application of *Chevron* in *Vinyl Chloride*. With that judicial background for guidance, EPA launched the rulemakings to reassess the NAAQS for ozone and PM that culminated in the decision below.

In these rulemakings, EPA replaced the existing 1-hour ozone NAAQS with a more stringent 8-hour standard, and the existing particulate matter NAAQS based on a "PM_{10}" size indicator with "$PM_{2.5}$" standards for fine particles and "PM_{10}" standards for coarse particles.[15] For each of these "non-threshold" pollutants,[16] EPA was presented with a choice among alternative standard levels characterized by uncertain and indistinguishable health risks, a choice calling for the exercise of risk management judgment.

Regarding the revised ozone NAAQS, for example, CASAC concluded that the scientific record established "no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public

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[15] The court of appeals vacated the coarse particle standard as arbitrary and capricious, *see* EPA App. 57a-58a, because the PM_{10} indicator included a variable amount of fine particulate matter. EPA has sought no further review of this ruling.

[16] *See, e.g.*, Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237 ("[T]here is no threshold concentration for the onset of biological responses due to exposure to ozone above background concentrations."). *See also OAQPS Staff Paper*, PM JA 2068.

health."[17] With respect to the revised PM NAAQS, CASAC members could form no consensus regarding the level, averaging time or form of a revised standard because of many uncertainties regarding both the existence and nature of a causal relationship between public health and the $PM_{2.5}$ indicator.[18] The Administrator's choice among alternative standard levels therefore reflected "policy" judgment.[19]

If the record was not clear about what level is "safe," it was quite clear that EPA's choice of level would have profound impacts on society. For example, replacing the existing 1-hour ozone NAAQS, EPA explained, would require a new ozone reduction program based on the general planning requirements of Subpart 1 of the Act for certain areas of the country.[20] This would disrupt existing control programs and attainment planning that had been based on the specific ozone control strategies and attainment deadlines established

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[17] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 238. Similarly, EPA's staff concluded based on the extensive scientific record that an air quality level equivalent to the existing 0.12 ppm 1-hour NAAQS [*i.e.*, .09] "would reduce estimated exposures of the at-risk population sufficiently to provide some margin of safety.'" EPA, *Review of National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information* 167 (June, 1996), Ozone JA 1977. (emphasis added).

[18] Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (June 13, 1996).

[19] *See, e.g.*, 62 Fed. Reg. 38,883 (1997) ("margin of safety determinations . . . are largely judgmental in nature, particularly with respect to non-threshold pollutants, and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric").

[20] 62 Fed. Reg. 38,873 (1997), App. 74a-75a.

by Congress in Subpart 2 of the Act.[21] The record shows that besides disrupting ongoing ozone reductions, more restrictive NAAQS could increase unemployment, electricity rates, and the costs of food and other consumer products.[22]

Indeed, by EPA's own admission, the costs of full attainment of the revised ozone NAAQS (estimated by EPA at $9.6 billion per year) would outweigh its benefits (estimated by EPA at $1.5 to 8.5 billion per year).[23] Even at

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[21] *See* CAA Industry Respondents' Brief in Response, Argument § II; EPA's science advisers therefore recommended against a decision that would require different ozone NAAQS in different areas -- the consequence of EPA's final rule -- because of the confusion this would cause. *See, e.g.*, CASAC Tr. (Mar. 22, 1995), at 303, 308, Ozone JA 280, 282; CASAC Tr. (Sept. 19, 1995), at 235, Ozone JA 322; George T. Wolff, *Comments on February, 1995 Ozone Staff Paper* (Mar. 27, 1995), at 4, Ozone JA 383; Paulette Middleton, *Ozone Criteria Document Review* (Mar. 29, 1995), Ozone JA 387; *see also* 62 Fed. Reg. 38,861 ("[R]eductions in risks from both short-term and prolonged exposures can be achieved. . . with an averaging time of either 1 or 8 hours.").

[22] *See, e.g.*, AFBF Comments (Mar. 12, 1997) 1-3, Ozone JA 3318-20 (impacts on agricultural sector and increased food prices); Comments of Tennessee Valley Authority (filed Mar. 11, 1997), at 10, Ozone JA 3317 (11% increase in electric rates and job loss); Anne E. Smith, *et al., Costs, Economic Impacts, and Benefits of EPA's Ozone and Particulate Standards*, Reason Public Policy Inst. Policy Study No. 226 (June, 1997), at 9-12, Ozone JA 3323-26; Ralph L. Keeney and Kenneth Green, *Estimating Fatalities Induced by Economic Impacts of EPA's Ozone and Particulate Standards*, Reason Public Policy Inst. Policy Study No. 225 (June, 1997), at i, 13, Ozone JA 3327-28 (unemployment and income effects).

[23] *See* EPA, *Regulatory Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* at ES-13, ES-19, 7-11, 9-1 (1997) ("RIA"), Ozone JA 2920, 2926, 2932, 2934. The cost of attaining the revised particulate standards was

these costs, EPA was unable to identify control techniques for ozone and its precursors that would bring about nationwide attainment.[24]

CAA Industry Cross-Petitioners argued below that prior decisions of the D.C. Circuit should not be read to preclude EPA in this case from considering the overall impacts of its decision on society when deciding whether revising a NAAQS is "appropriate," and in choosing among alternative standard levels that cannot be distinguished from a public health protection standpoint when establishing an "adequate margin of safety." The court below briefly and emphatically rejected these arguments under *Chevron* step one, concluding based on *Lead Industries* that the CAA "on its face does not allow consideration of technological or economic feasibility," and that this prohibition extends to all of the impacts on society raised by CAA Industry Cross-Petitioners. EPA App. 19a.

REASONS FOR GRANTING THE PETITION

The holding of the court below that overall impacts on society may never be considered in choosing among alternative levels for a NAAQS presents an extreme and

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also high, $37 billion each year. *Id.* at 9-1, Ozone JA 2934. By contrast, only $17 billion was spent on *all* medical research in the United States in 1996. U.S. Dept. of Commerce, *Statistical Abstract of the United States 1998*, 118 Table 165.

[24] EPA therefore based its cost estimates for ozone on an assumed control cost of $10,000 per ton of pollution removed and for PM on a cost not exceeding $1 billion/$\mu g/m^3$. RIA at ES-11 to ES-12, Ozone JA 2918-19. EPA's estimate of the cost to attain the $PM_{2.5}$ standards reflected similar problems in identifying feasible control strategies. *Id.* at ES-12, Ozone JA 2919.

illogical reading of the Clean Air Act that will prevent the Agency from making sound risk management decisions on remand, and that will have serious adverse impacts on public health and welfare. It is a reading that is *not* compelled by the statute.

EPA's decisions regarding NAAQS are the single most costly "public health" based regulatory decisions made by any administrative agency. As EPA itself recognizes, the standards challenged here would impose costs on society of tens of billions of dollars each year. In the case of ozone, even EPA concedes that these costs may outweigh the benefits.

When, as here, scientific data does not clearly indicate the magnitude of a pollutant's impact on human health, EPA can only make a rational decision regarding how much to regulate -- or whether to revise an existing standard at all -- if it can consider the practical impacts of alternative decisions. A pollution level of debatable health significance might warrant further regulation if it can be reduced easily, with no collateral adverse effects. That same pollution level might not warrant more stringent regulation in the name of "public health" if regulation involved disrupting existing control programs, extraordinarily high costs, and collateral environmental damage. Yet the D.C. Circuit forbids EPA to consider precisely such factors in determining whether revision to an existing NAAQS is "appropriate," and in determining a standard that is "requisite to protect the public health" with an "adequate margin of safety."

Against this background, the lower court's decision disregards the need to protect public health on many fronts, with finite resources. As members of this Court have recognized, a profligate commitment of money and

technology to guard against one set of uncertain risks may result in inadequate means to cope with other more serious problems.[25] Furthermore, without consideration of the unavoidable relationship between the costs of goods produced and the capacity of the public to purchase such goods, stringent margins of safety designed to protect against *hypothetical risks* could have the effect of increasing the cost of -- and perhaps even denying to the poor and those on fixed incomes -- products such as electricity for heating and cooling that are essential to a healthful environment.[26] The lower court's decision therefore accepts regulation that produces only theoretical benefits for society while creating the prospect of potentially greater harm that does not benefit the "public."

These ideas deserve consideration in any review of the decision below. The pervasive reach of ambient standards under the Clean Air Act and the inconsistency of the D.C. Circuit's approach to the "margin of safety" concept, coupled with the fact that EPA already considers the broader impacts of its NAAQS decisions *sub silentio*,[27] suggest that resolution

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[25] *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle* 19 (1993); *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 669-70 (1980) (Powell, J., concurring).

[26] In his concurrence in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) for example, Justice Powell recognized that "the shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality." *Id.* at 272 (Powell, J., concurring).

[27] *See, e.g.*, David Schoenbrod, "Remarks to the Board of Trustees of the Natural Resources Defense Council," 20 *Cardozo L. Rev.* 767, 769 (1999) (In the 1970 CAA, Congress "wanted the agency to consider costs without implicating them. EPA has done so under Republicans and

of the question presented in this Conditional Cross-Petition has tremendous importance to the public and the American economy. Indeed, removing the judicially-imposed bar on consideration of factors other than possible direct health effects when EPA is confronted with uncertain and indistinguishable health risks would do no more than make EPA publicly accountable for how it weighs these other factors as a practical matter, and would allow judicial review of the way in which these factors influence EPA NAAQS decisions.

I. THE DECISION BELOW INTRUDES ON THE AGENCY'S ROLE IN DEFINING ITS AUTHORITY, AND IGNORES THE PURPOSES OF THE CLEAN AIR ACT.

In some CAA provisions, Congress restricted the exercise of the Administrator's discretion to certain factors. Section 110 of the Act, for example, requires EPA to consider only the factors listed in § 110 in approving state implementation plans ("SIPs").[28] In other provisions of the Act, however,

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Democrats alike."); *see also* CASAC Tr. (3/22/95) at 296-97, Ozone JA 278-79 ("a politically astute Administrator will certainly be mindful of [cost calculations]") ; Craig Oren, "Run Over by *American Trucking* Part I: Can EPA Revive its Air Quality Standards?", 29 *Envtl. L. Rev.* 10662 (Nov. 1999) ("EPA decisionmakers have admitted that they examine cost data when deciding on the levels of the standards."). Evaluating the cost of alternative regulatory options is, of course, required by CAA § 108(b) and is the purpose of EPA's Regulatory Impact Assessment ("RIA"). *See* RIA, *supra* note 23, at ES-2 to ES-3.

[28] *Union Electric,* 427 U.S. at 257 (1976). Once factors are enumerated, an agency may lack discretion to consider additional factors. For example, in *Union Electric v. EPA*, this Court held that section 110(a)(2)

Congress did not specify the factors for EPA to consider. Where factors are not specified, the Administrator must consider *all factors relevant to achieving the overall objectives of the Act as stated in its purposes section and legislative history.*[29]

This petition turns on the question whether the "adequate margin of safety" language of § 109(b), or the direction in § 109(d) that EPA revise NAAQS "as may be appropriate" in accordance with § 109(b), restricts the Agency's consideration of factors otherwise relevant to the exercise of risk management judgment. The lower court held emphatically that it does. EPA App. 19a-21a.

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of the Act, which stated that the Administrator "shall approve" plans that meet eight enumerated criteria, did not authorize the Administrator to reject such plans on grounds of technological or economic feasibility.

[29] *See Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). In *Whirlpool*, Justice Stewart, writing for a unanimous Court, analyzed the validity of an agency's regulation by examining its conformance with the "fundamental objective" of the Occupational Safety and Health Act. *Id.* at 11. *See also AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721, 734-35 (1999) ("The Act requires the FCC to apply *some* limiting standard rationally related to the goals of the Act"). Previously the Court of Appeals had itself illustrated the overriding importance of the purposes section of the Clean Air Act by ruling that section 101(b)(1) imposed upon the Administrator the obligation to establish a regulatory program that was not mentioned in the operative provisions of the Act. *See Sierra Club v. EPA*, 540 F.2d 1114 (D.C. Cir. 1976), *vacated sub nom. Montana Power Co.* v. *EPA*, 434 U.S. 809 (1977); *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C.), *aff'd per curiam*, 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973). Here Cross-Petitioners have urged that the purposes section be used in a more traditional sense -- to define the contours of general language in the Act's operative provisions.

But § 109 on its face contains no mandate that the Agency ignore the overall public well-being. As Judge Skelly Wright observed in *Lead Industries*, "[s]ection 109(b) does not specify precisely what Congress had in mind when it directed the Administrator to prescribe air quality standards that are 'requisite to protect the public health.'" 647 F.2d at 1152. Likewise Congress did not elaborate on either the "adequate margin of safety" language for setting NAAQS, or the "as may be appropriate" language of § 109(d) for revising NAAQS.

As the court of appeals observed in *Vinyl Chloride*, quoting this Court's opinion in *Industrial Union Dept.*, 448 U.S. at 642, "'safe' does not mean 'risk free,'" and a term like "ample" leaves EPA "great latitude in meeting its responsibility." 824 F.2d at 1153. If so, surely the word "adequate" in § 109 contemplates more latitude. Because the word "ample" "does not indicate that Congress intended to preclude consideration of *any* factor," *id.* at 1155 (emphasis added), the word "adequate" must allow consideration of a broad range of factors as well.

When the court in *Lead Industries* rejected the argument that § 109(b) "*required* the Administrator to consider economic and technological feasibility," 647 F.2d at 1148 (emphasis added), therefore, it was not because the language of § 109 on its face compelled this result. Rather the court relied on indicia of legislative intent that it drew from the statutory context, legislative history and structure of the Act.[30]

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[30] *But see* H.R. Rep. No. 95-294, at 127, *reprinted in* 4 1977 Legis. Hist., at 2594; *Hearings on S. 251, S. 252 and S. 253 Before Subcomm. on Environmental Pollution of Senate Comm. on Environment and Public*

In *Chevron, U.S.A. Inc v. Natural Resources Defense Council,* however, this Court held that it is not for the reviewing court to fill out the terms of a broad delegation of regulatory authority. Rather, where Congress has delegated in broad terms, it is for the agency to fill out the statutory provision "within the limits of [the congressional] delegation."[31]

Lead Industries' holding that § 109(b) does not "require" EPA to consider the costs and feasibility of pollution controls as factors that could override the basic public health protection goal of § 109 is sound. However, reading the *Lead Industries* to mean that EPA is *forbidden* from ever

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Works, 95th Cong., 1st Sess., Part 3, at 6-7 (1977); (making clear that Congress in § 109 rejected a "no-risk philosophy [that] ignores all social and economic consequences" and intended § 109 to be sufficiently flexible "to insure that public [health] policy is wise policy."); *see also id.* at 37 (statement of Sen. Muskie) (commenting that the national primary and secondary standards "were written as the minimal burden we could impose upon the dirty air areas of the country to clean up without bringing their economies to a screeching halt."), *see also supra* notes 5-7.

[31] 467 U.S. 837, 865 (1984); *see id.* at 843 (holding that the court does not impose its own interpretation of a statute when Congress has not clearly spoken to the issue); *see also Smiley v. Citibank,* 517 U.S. 735, 740-41 (1996) (explaining that deference accorded under *Chevron* is based on "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that *the ambiguity would be resolved, first and foremost, by the agency,* and desired the agency . . . to possess whatever degree of discretion the ambiguity allows.") (emphasis added); *Whirlpool,* 445 U.S. at 11 ("the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act."); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941) (remanding and directing NLRB "to give clear indication that it has exercised the discretion with which Congress has empowered it.").

balancing uncertain health risks against other indirect health risks as well as the costs and feasibility of controls when making risk management decisions, as the court below has done, is a mistake. Given the narrow issue presented in *Lead Industries*, Judge Wright's overbroad statement that economic and technological considerations can "play no part" in the promulgation of ambient standards should not be read to resolve issues not yet presented to the court, particularly in light of this Court's subsequent decision in *Chevron*. Rather, under *Chevron*, the Agency must look to the intent of Congress to give content to the broad delegation of authority in §§ 108 and 109 of the Clean Air Act.[32]

The fundamental objective of the Clean Air Act is to protect the public health without losing sight of economic and social realities. This objective is reflected in the Act's legislative history[33] and made explicit in its statement of

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[32] 467 U.S. at 842-43; *Smiley*, 517 U.S. at 740-41; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 48 (1983) (noting that the court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner"); *see also American Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1997) ("with its delicate balance of thorough record scrutiny and deference to agency expertise, judicial review can occur *only when* agencies explain their decisions with precision, for 'it will not do for a court to be compelled to guess at the theory underlying the agency's action. . . .'" (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)) (emphasis added).

[33] The legislative history reveals that fulfillment of the Act's objectives necessitates attention to economic and feasibility considerations. As early as 1967, in enacting the first Air Quality Act, Pub. L. 90-148, 81 Stat. 485, Congress evidenced an intention that the development of air quality standards "be influenced not only by a concern for the protection of health or welfare, but also by economic, social and technological consideration." S. Rep. No. 90-403, at 28 (1967). In amending the Act

"purposes." Thus, § 101(b)(1) of the Act states that the purpose of the Act is "to protect and enhance the quality of the Nation's air resources *so as to promote* the *public health* and *welfare* and the *productive capacity* of its population." Clean Air Act § 101(b)(1), App. 1a (emphasis added). Framing Agency action to accommodate the three different statutory objectives calls for balancing.[34]

Similarly, in reviewing existing NAAQS under § 109(d), Congress required the Administrator to obtain, and by necessary implication to consider, the advice of an independent scientific review committee on "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of such NAAQS. CAA § 109(d)(2). EPA App. 113a. These factors cover the issues the Administrator would have to address to ensure that her decision furthers the purposes of the Act.

Finally, § 109(d)(1) calls for revision of standards as may be appropriate in accordance with "section 108 of this title and subsection (b)" of § 109. Section 108, in turn, calls for

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in 1977, Congress again emphasized that its purpose was to "insure the protection of the public health and the environment . . . while *at the same time considering the energy and economic needs of this Nation.*" H.R. Rep. No. 95-294, at 34-35 (1977), *reprinted in* 4 1977 Legis. Hist., at 2501-02 (emphasis added).

[34] The Administrator has long recognized the importance of economic and other factors to fulfillment of the Act's objectives set forth in § 101 (b) (1). Thus, in proposing the prevention of significant deterioration program the Administrator observed that the Agency cannot, and should not, decide on a regulatory approach without *"full consideration of its economic and social implications."* 38 Fed. Reg. 18,986 (1973) (emphasis added).

development of information on "all identifiable effects on public health *or welfare* which may be expected from the presence of such pollutant in the ambient air" *and* on the overall impacts of available methods for "prevention and control of air pollution." CAA § 108(a), (b), EPA App. 110a, App. 1a-2a (emphasis added).

Rather than forbidding the balancing of burdens and benefits, all of this language contemplates a well-informed policy decision that reflects the best balance of benefits and burdens to society. This is the essence of decisions formulating "*public* health" policy.

In sum, rational risk management decisions require that all costs and benefits be considered insofar as possible.[35] As one commentator observed, "camouflaging controversial policy decisions as science assists the agency in evading political, legal and institutional forces."[36] In the absence of clear statutory language establishing that Congress intended costs along with all other burdens on society to be ignored, it is unreasonable to assume that the Act bars consideration of

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[35] *See, e.g.*, Stephen Breyer & Richard Stewart, *Administrative Law & Reg. Policy* 350 (3d ed. 1992) ("How can the significance of a risk be determined in isolation from the cost of eliminating the risk?"); K. Arrow, *et al.*, "Is There a Role for Benefit-Cost Analysis in Environmental, Health and Safety Regulation?," 272 *Science* 221 (April 12, 1996) (advocating the use of cost benefit analyses in regulatory decisions on environmental protection); R. Morgenstern, ed., *Economic Analyses at EPA*, ix-x (Resources for the Future, Washington, D.C. 1997) ("T]hough it should never be the only factor on which to base a regulatory decision, economic analysis in its many forms should always be one of the factors.").

[36] Wendy Wagner, "The Science Charade in Toxic Risk Regulation," 95 *Colum. L. Rev.* 1613, 1617 (1995).

these factors in all cases, especially in light of Congress' broad statement of purposes and the specific information requirements of § 109(d) described above.

If the court below had recognized the Agency's authority to fill out the congressional delegation based on the purposes of the Act, therefore, it would have found unreasonable an interpretation of the statute that bars consideration of social, economic, and technological factors in making risk management decisions, when the Agency is confronted with a range of uncertain or indistinguishable health risks. The court, however, concluded its hands were tied by its earlier decision in *Lead Industries*. CAA Industry Petitioners believe that this aspect of the lower court's nondelegation holding is worthy of review by this Court, and do not oppose certiorari on the nondelegation issue if it is framed to address the D.C. Circuit's mistaken ban on considering the very factors most logically relevant to establishing an "intelligible principle" for risk management decisions under §§ 108 and 109.

II. ONLY THIS COURT CAN CORRECT THE SERIOUSLY FLAWED D.C. CIRCUIT LAW REGARDING THE CLEAN AIR ACT'S NAAQS PROGRAM.

The Clean Air Act provides that petitions for review of ambient standards may be filed only in the District of Columbia Circuit. CAA § 307(b)(1). This provision ensures that the issues presented in this petition will never be presented for decision in a forum other than the D.C. Circuit. Accordingly, review by this Court affords the only opportunity to correct a D.C. Circuit decision that will have

profound and pervasive economic and social consequences if left undisturbed.

CONCLUSION

For the reasons stated above, this Conditional Cross-Petition for Certiorari should be granted if certiorari is otherwise granted in this case.

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